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May 12, 2014

Via ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: EX PARTE NOTICE

GN Docket No. 12-268: *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*

WT Docket No. 12-269: *Policies Regarding Mobile Spectrum Holdings*

Dear Ms. Dortch:

An extensive record supports the Federal Communications Commission's (FCC or Commission) conclusion that diversity in holdings of low-frequency spectrum, with its superior propagation characteristics, is crucial to advance mobile wireless deployment and effective wireless competition.¹ The auction rules proposed by FCC staff ensure that diversity by offering smaller carriers access to this essential resource.²

AT&T has now filed a last-minute written *ex parte* communication asserting that the proposed auction rules violate the Spectrum Act, the Communications Act, and the Administrative Procedure Act (APA) in thirteen different ways. The Commission should reject AT&T's attempt to

¹ Pursuant to 47 C.F.R. §§ 1.1203(a)(1) and 1.1204(a)(10) as well to 47 C.F.R. §§ 1.1203(c) and 1.1206(b)(2)(v), CCA files this letter with the advance approval of Commission Staff. *See* 47 C.F.R. § 1.1204(a)(10) (authorizing filings during the Sunshine Period made "with the advance approval of Commission Staff"). This letter directly replies to AT&T's *ex parte* letter that was delayed in posting to the FCC's Electronic Comment Filing System ("ECFS") and did not post until Friday, May 9, 2014. *See* Letter from Peter D. Keisler, Counsel to AT&T, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268, WT Docket No. 12-269 (posted May 9, 2014) ("*AT&T Letter*"); *see also* 47 C.F.R. § 1.1206(b)(2)(v) (authorizing replies to *ex partes* made during the Sunshine Period).

² *See* T-Mobile Ex Parte Notice, GN Docket No. 12-268, WT Docket No. 12-269 (Apr. 24, 2014).

look for problems where none exist. AT&T's statutory argument is without basis in the Spectrum Act's text or the case law, and it is contradicted by the statute's legislative history. The Commission has clear statutory authority to adopt the proposed auction rules. AT&T's long list of APA arguments is similarly baseless. The record demonstrates the strong connection between the proposed rules and the goals for spectrum auctions established by Congress.

I. THE FCC HAS STATUTORY AUTHORITY TO IMPLEMENT AUCTION RULES THAT PROMOTE COMPETITION.

AT&T contends that Section 6404 of the Spectrum Act,³ which added a new section 309(j)(17) to the Communications Act, prohibits the FCC from adopting auction-specific rules reserving some spectrum for non-dominant bidders. That argument cannot be squared with the statutory text or history. *First*, AT&T misreads section 309(j)(17)(A) in a way that would nullify other subsections of the same statute – an impermissible approach to statutory construction. *Second*, AT&T's interpretation is contradicted by section 309(j)(17)(B), which expressly approves “rules concerning spectrum aggregation that promote competition” and which cannot be brushed aside on the grounds AT&T proposes. *Third*, AT&T's last-ditch argument is belied by the legislative history of the Spectrum. Finally, the Commission's proposed auction framework will be granted significant Chevron deference. In sum, the FCC has clear authority to reserve spectrum for bidders with less market power, despite AT&T's claims.

A. AT&T's Argument Regarding Subparagraph (A) Is Countertextual.

AT&T focuses on Subparagraph (A) of Section 309(j)(17), which provides that the Commission “may not prevent a person from participating in a system of competitive bidding” if the bidder complies with all auction procedures and meets all the qualifications.⁴ But AT&T's attempt to shoehorn the FCC's proposed incentive auction rules into this prohibition suffers from two principal flaws: First, the proposed rules do not “prevent” auction participation. And second, reading Subparagraph (A) as AT&T would is impermissible because it would nullify other FCC powers under Section 309(j).

AT&T's argument depends on the notion that the proposed rules would “prevent” it from “participating in a system of competitive bidding.” But that characterization is insupportable. AT&T will not be excluded from participating in the auction in any market. Even for reserved spectrum, AT&T will be able to bid in nearly two-thirds of all markets. Indeed, AT&T concedes that it will be able to participate, and to buy spectrum without any restrictions at all, in many areas.⁵ And AT&T concedes that even in markets where it has substantial market power, it will “be able to bid for *some* of the available spectrum,” it complains only that it will not be able to bid for *all* of it.⁶

³ See Title VI of the Middle Class Tax Relief and Job Creation Act of 2012 (P.L. 112-96) Section 6404.

⁴ 47 U.S.C. § 309(j)(17)(A).

⁵ See *AT&T Letter* at 9 (“There are vast swaths of rural America in which AT&T does not currently hold one-third of the outstanding low-frequency spectrum. Specifically, AT&T would not be excluded in the vast majority of Rural Service Areas from 300 to 731.”).

⁶ *AT&T Letter* at 3.

Those concessions foreclose its argument. Looking at the plain meaning of subparagraph (A)'s key statutory terms, "prevent" means to "stop (something) from happening or existing," while a "system" is "a group of related parts that move or work together."⁷ Thus, while subsection (A) prohibits the FCC from excluding qualified bidders *entirely* in an auction, nothing in that provision limits the Commission's authority to impose allocation constraints that permit participation in the auction system. In fact, that provision ensures that dominant carriers cannot stifle competition by obtaining all available spectrum. Imagine, for example, that the FCC held an auction consisting of only two blocks of licenses. If the Commission established a rule that dominant bidders could only compete for one block rather than both, nothing in subparagraph (A) would invalidate the rule because bidders would still be permitted to participate in the system of competitive bidding by acquiring one of the two blocks. That is precisely the result under the auction rules proposed by FCC staff here.

To argue otherwise, AT&T contends that "[t]he Commission, in effect, is creating two auctions" and excluding it from one of them.⁸ But that characterization runs counter to how the auction will actually function. The Commission is not conducting two simultaneous but separate ascending auctions in which unrestricted bidders can freely arbitrage against the two pools. For one thing, the licenses available in each area are fungible across the pools, and will not be assigned until after the auction is complete; in other words, there are no separate, identifiable assets to be auctioned separately. For another, unrestricted bidders may bid on all available spectrum – both reserved and unreserved – simultaneously. Indeed, an unrestricted bidder willing to pay the highest price for all blocks could win them all with a single bid – a strategy that would not be possible if the Commission were conducting two auctions.

Further confirmation that AT&T's characterization of the FCC holding two auctions is wrong comes from experience with dozens of auctions around the world that used "set-asides" for smaller carriers, which are the functional equivalent of reserved spectrum.⁹ These set-asides have been used in the Canadian AWS auction, the United Kingdom 3G auction, and the U.S. auctions of the D, E, and F blocks, to name just a few. Each of these events was understood as a single auction. The same is true here. The proposed rules permit AT&T to "participat[e] in [the] system of competitive bidding" by vying for the unreserved blocks of spectrum, and AT&T cannot show that further bidding on the reserved blocks constitutes an entirely separate auction.

⁷ See Merriam-Webster online, www.merriam-webster.com/dictionary.

⁸ *AT&T Letter* at 3.

⁹ See Peter Cramton, Evan Kwerel, Gregory Rosston, & Andrzej Skrzypacz, *Using Spectrum Auctions to Enhance Competition in Wireless Services*, 54 CHI. J. L. & ECON; Ian Ayres & Peter Cramton, *Deficit Reduction Through Diversity: How Affirmative Action at the FCC Increased Auction Competition*, 48 STANFORD L. REV. 761 (1996), available at <http://www.cramton.umd.edu/papers1995-1999/96slr-deficit-reduction-through-diversity.pdf>.

If there were any doubt that AT&T's interpretation is wrong, it is put to rest by the consequences of AT&T's approach. It would nullify powers Congress gave to the FCC elsewhere in the same statutory provision. That is impermissible.¹⁰

AT&T apparently proposes that subparagraph (A) forbids the FCC from placing *any* subset of the spectrum available at an auction outside the reach of particular bidders. But if that understanding were correct, then the FCC could not enforce other commands that Congress issued to it. Subsection 309(j)(3)(B), for instance, instructs the FCC to “avoid[] excessive concentration of licenses” and to “disseminate[] licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.” Subsection 309(j)(4)(D) likewise instructs the FCC to structure its regulations in such a way as to “ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures.” If AT&T's understanding of the statute were correct, the FCC could *never* take any effective steps to adhere to those commands, because any rule the Commission adopted to ensure access for one of the statutorily specified groups would have the effect of shutting out a dominant carrier like AT&T.

AT&T's interpretation is *not* correct. Subparagraph (A) forbids the FCC from shutting a particular qualified bidder out of the auction system altogether, not from adopting auction rules that promote competition with respect to certain blocks of spectrum.

B. AT&T Fails to Grapple With Subparagraph (B).

AT&T's statutory argument thus flounders on the text of Subparagraph (A) standing alone, but it is particularly implausible in light of Subparagraph (B), which clarifies that “[n]othing in subparagraph (A) affects any authority the Commission has to adopt and enforce rules of general applicability, *including rules concerning spectrum aggregation that promote competition.*”¹¹ Subparagraph (B) expressly permits the Commission to adopt and enforce spectrum aggregation limits – exactly what the Commission has proposed here.

AT&T contends that Congress drafted subparagraph (B) only to make clear that generally applicable limitations on spectrum ownership are not “in effect a prohibition on auction participation.”¹² But by its plain terms, subparagraph (B) has a broader reach. It clarifies that “[n]othing in subparagraph (A) affects *any* authority the Commission has to adopt and enforce rules of general applicability” – and it specifically approves “rules concerning spectrum aggregation that promote competition.” It is difficult to imagine how Congress could have been clearer in foreclosing an interpretation of subparagraph (A) like the one AT&T now advances.

¹⁰ See, e.g., *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (noting canon that statutes should be read to avoid making any provision “superfluous, void, or insignificant”).

¹¹ 47 U.S.C. § 309(j)(17)(B) (emphasis added).

¹² *AT&T Letter* at 3.

Perhaps realizing as much, AT&T tries to get around subparagraph (B) by arguing that the proposed auction rules are not “rules of general applicability,” and thus that subparagraph (B) does not apply. That argument does not withstand examination. A rule of general applicability is simply one that speaks in general terms and “applies across the board,” rather than singling out particular entities on its face.¹³ The rules here easily qualify. AT&T’s suggestion that the rules are not generally applicable because they happen to affect AT&T more than some other entities is wrong on both the law and the facts. On the law, “it is well established that a law may still be generally applicable, even if it affects only one entity.”¹⁴ And on the facts, AT&T concedes elsewhere in its letter that the proposed rules here do *not* just affect one or two entities anyway: AT&T says that the rules “*almost exclusively*” affect AT&T and Verizon. But then it admits that there are many markets where AT&T and Verizon do not have sufficient low-frequency spectrum to come within the eligibility limitations proposed by the FCC.¹⁵ AT&T’s own filing thus underscores that these rules are generally applicable. They fall squarely within the FCC’s authority under subparagraph (B).

Nor is subparagraph (B) an outlier, or a new grant of power that the FCC did not previously enjoy. In fact, the Communications Act provides ample authority for adopting reasonable spectrum aggregation limits. The Act charges the Commission, in designing auctions and specifying license eligibility, with including “safeguards to protect the public interest in the use of the spectrum.”¹⁶ More pointedly, the Act instructs the FCC to encourage “economic opportunity and competition,” to take steps to avoid “excessive concentration of licenses” by “disseminating licenses among a wide variety of applicants,” and to “promote new technologies, products, and services for the benefit of the public including those residing in rural areas.”¹⁷ Absent the modifications provided in the Spectrum Act, the FCC could have, consistent with the Communications Act, barred specific carriers from bidding in the incentive auction at all. AT&T has failed to cite to any provision in the Act that would prevent the Commission from employing spectrum aggregation limits to foster competition and achieve other statutory goals. It cannot do so because no such provision exists.

C. The Legislative History Undercuts AT&T.

If there were any doubt on these points, the Spectrum Act’s legislative history forecloses AT&T’s interpretation of the statute. Section 6404, which added Section 309(j)(17)(A) and (B) to the statute, was “carefully negotiated” to “address the issue of auction participation *while preserving the FCC’s authority to protect against undue concentration of spectrum holdings.*”¹⁸ In terms that could not be clearer, representatives involved in drafting and negotiating the Spectrum Act assured the Commission that Section 6404 “does *not* require the FCC to allow every carrier to bid for every

¹³ *Pro-Eco, Inc. v. Board of Com’rs of Jay County, Ind.*, 57 F.3d 505, 513 (7th Cir. 1995).

¹⁴ *Tadros v. Village of Hazel Crest*, 2008 WL 4874183, at *4 (N.D. Ill. June 26, 2008) (collecting cases).

¹⁵ *AT&T Letter* at 5, 9.

¹⁶ 47 U.S.C. § 309(j)(3).

¹⁷ *Id.*

¹⁸ Letter from Representatives Henry A. Waxman, Anna G. Eshoo, Diana DeGette, Mike Doyle, and Doris Matsui and Senator Edward J. Markey to Chairman Julius Genachowski, WT Docket No. 12-269, at 1 (May 16, 2013) (“Waxman Letter”) (emphasis added).

megahertz of a spectrum band that is made available for auction.”¹⁹ And efforts to provide otherwise failed. While Section 6404 was in committee in February 2012, Representative Fred Upton unsuccessfully attempted to modify the language to require the FCC to allow a “full spectrum of bidders” to bid in incentive auctions.²⁰ Similarly, a proposal to modify Subparagraph (B) by adding “other, industry wide” before “rules of general applicability” was considered, and rejected as contrary to the intent of the provision’s sponsors.²¹

Representative Upton clarified that “The reference to ‘rules concerning spectrum aggregation that promote competition’ is meant not to confer any new authority on the agency, but merely to illustrate that the FCC retains authority to adopt such rules in an industrywide rulemaking to the extent such authority can be found elsewhere in the Communications Act and does not conflict with the prohibition on excluding bidders.”²² Commission authority clearly exists elsewhere in the Communications Act, including in 309(j)(3)(B) and 309(j)(4)(D), and AT&T’s ability to bid for auctions in every market does not conflict with any prohibitions on excluding bidders. As Representative Eshoo clarified, “This provision is critical to ensuring that the FCC can meet its statutory obligations to ensure competition in the wireless market by avoiding an excessive concentration of licenses through auction-specific rules.”²³

Efforts to provide this sort of unfettered access by any one carrier were not accepted by the Conferees, including language to require the FCC to allow a “full spectrum of bidders” to bid in incentive auctions.²⁴ Similarly, a proposal to modify Subparagraph (B) by adding “other, industry wide” before “rules of general applicability” was considered, and rejected as contrary to the intent of the provision’s sponsors.²⁵

Indeed, at the time Section 6404 was enacted, AT&T itself understood that the statute permitted the FCC to limit bidding on reserved spectrum. AT&T was reportedly “furious” when it learned that the Conferees had agreed on the language ultimately enacted as Section 309(j)(17) because the statute reaffirmed the FCC authority to constrain AT&T’s ability to bid for all spectrum in an auction.[1] AT&T unsuccessfully lobbied to get the language changed. Its current efforts to distort Section 6404’s plain language should be rejected as clearly contrary to the will of Congress. .

¹⁹ *Id.* at 2.

²⁰ See Conference Report on H.R. 3630, Middle Class Tax Relief and Job Creation Act of 2012, Statement Henry Waxman (“Waxman Statement”), 158 Cong. Rec. 31, E265-267 (Feb. 28, 2012).

²¹ See Waxman Statement.

²² 158 Cong. Rec. E237, E238 (daily ed. Feb. 24, 2012) (Statement of Rep. Upton), *available at* <http://www.gpo.gov/fdsys/pkg/CREC-2012-02-24/pdf/CREC-2012-02-24-extensions.pdf>.

²³ 158 Cong. Rec. E272 (daily ed. Feb. 28, 2012) (Statement of Rep. Eshoo), *available at* <http://www.gpo.gov/fdsys/pkg/CREC-2012-02-28/pdf/CREC-2012-02-28-pt1-PgE272-3.pdf>.

²⁴ See Conference Report on H.R. 3630, Middle Class Tax Relief and Job Creation Act of 2012, Statement Henry Waxman (“Waxman Statement”), 158 Cong. Rec. 31, E265-267 (Feb. 28, 2012).

²⁵ See Waxman Statement.

D. AT&T's Chevron Argument Is Off-Base.

Even if AT&T had offered a persuasive alternative interpretation of the Spectrum Act, that would, at best, mean the statute is ambiguous. This ambiguity presents no threat to the proposed rules because the Commission's interpretation would then be entitled to *Chevron* deference. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). For all the reasons set forth above, it is at least a *permissible* construction to interpret the statute as authorizing the proposed rules.

AT&T offers a tepid response. It asserts that the proposed rules could not survive *Chevron* because they are “contrary to Congress’ fundamental purpose of ensuring full auction participation and the efficient allocation of spectrum.”²⁶ Even putting aside AT&T's unwarranted assumption that its preferred approach is more “efficient,” that argument fails because it cherry-picks among Congress's expressed purposes. Congress also made clear throughout the Act that its purposes include encouraging economic opportunity, encouraging competition, avoiding “excessive concentration of licenses,” disseminating licenses among various types of businesses, and encouraging rural buildout.²⁷ The proposed rules are consistent with all of those purposes.

II. THE RECORD FULLY SUPPORTS THE PROPOSED RULES, WHICH MAXIMIZE REVENUE AND PROMOTE COMPETITION.

Unable to succeed on its statutory arguments, AT&T falls back on a kitchen-sink assortment of claims that the proposed auction rules are arbitrary and capricious under the APA.²⁸ The APA creates a high bar for setting aside agency rules as arbitrary and capricious. The agency must have “relied on factors which Congress has not intended for it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view of the product of agency expertise.”²⁹ Policy choices will not be disturbed if the agency has “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”³⁰ None of AT&T's arguments comes close to the kind of “clear error of judgment” a court would reverse.³¹

²⁶ *AT&T Letter* at 4.

²⁷ See, e.g., 47 U.S.C. § 309(j)(3).

²⁸ 5 U.S.C. § 706(2)(A).

²⁹ *Agape Church, Inc. v. FCC*, 738 F.3d 397, 410 (D.C. Cir. 2013) (quoting *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

³⁰ *Verizon v. FCC*, 740 F.3d 623, 643-44 (2014) (quoting *State Farm*, 463 U.S. at 43)).

³¹ *Guertin v. U.S.*, 743 F.3d 382, 385-86 (2d Cir. 2014) (quoting *Bechtel v. Admin Review Bd.*, 710 F.3d 443, 446 (2d Cir. 2013); *Natural Res. Defense Council, Inc. v. U.S. Emtl. Prot. Agency*, 658 F.3d 200, 215 (2d Cir. 2011)).

A. The proposed rules avoid “excessive concentration of licenses.”

AT&T erroneously contends that the proposal to reserve up to three blocks in a geographic area for carriers that do not hold substantial amounts of low-band spectrum contingent upon the auction achieving sufficient revenue has “no connection to any legitimate spectrum aggregation policies” because it is based on “the amount of low-frequency spectrum that carriers hold today,” rather than ownership amounts post-auction.³² But Congress has directed the Commission to avoid excessive concentration of licenses, and the rules promote that goal even if they do not completely solve all concentration issues.³³ It is within the purview of the Commission to choose the specific means and methods by which it does so. The fact that a particular regulation provides only an incremental step towards that goal is no basis for a challenge under the APA.³⁴

The reserved/unreserved auction proposal ensures a pro-competitive distribution of the last major block of low-band spectrum that will be available for the foreseeable future. AT&T correctly points out that, after the auction, a carrier that was eligible to bid for reserved spectrum may hold a higher concentration of the asset. But by definition, that carrier will have started out with a lower concentration than the dominant carriers in the market – and so the auction rules undoubtedly work to even the playing field. That result does not mean the incentive auction rules have failed to avoid excessive concentration of spectrum as mandated by the Communications Act. Instead, the rules are part of a larger plan of competition policies that work together. The incentive auction rules focus on the best way to distribute a limited pool of low-band spectrum, and they work in concert with the spectrum screen and other policies that control exercises of market power.

Foreclosure rests on the idea that an entity that controls a majority of input resources will pay a premium above fair market value to prevent logical competitors from acquiring access to that resource at the fair market price.³⁵ AT&T stands to benefit from denying competitors access to low-band spectrum resources because it will help foreclose possibly more efficient competitors from the market. Thus, it is entirely logical to examine existing low-band spectrum holdings when assessing eligibility for reserve blocks rather than market holdings after the auction, which, in any case, are unknowable. The Commission has followed this approach for more than three decades. In the 1994 PCS auctions, for example, the FCC set a cap limiting the total amount of PCS spectrum a carrier could acquire that counted the previously licensed cellular bands and the newly available PCS spectrum toward the cap.³⁶

³² *AT&T Letter* at 5.

³³ *See* 47 U.S.C. § 309(j).

³⁴ *See Steel Manuf. Ass’n v. EPA*, 27 F.3d 642, 649 (D.C. Cir. 1994) (rejecting petitioners’ challenge to agency rulemaking on the ground that only one of the EPA’s stated rationales for the rule was supportable, and explaining that even if it were true that only one rationale was objectively correct, the rule nevertheless promoted the statutory scheme’s “abiding goal of reducing or eliminating the generation of hazardous wastes”).

³⁵ Jonathan Baker, *FCC Spectrum Allocation Rules that Promote Competition Are in the Public Interest* (July 8, 2013), attached to *Ex Parte* notice of T-Mobile USA, Inc., GN Docket No. 12-268, WT Docket No. 12-269 (July 8, 2013).

³⁶ *See Policies Regarding Mobile Spectrum Holdings*, Notice of Proposed Rulemaking, WT Docket No. 12-269 (rel. Sept. 28, 2012) (“In 1994, the Commission implemented a spectrum cap on Cellular,

B. The proposed rules create opportunities for a “wide variety of applicants.”

While AT&T contends that the FCC is irrationally favoring “preferred wireless providers” to the detriment of AT&T and Verizon, the only preference contained in the proposed auction rules is the one mandated by Congress – namely, a preference for disseminating “licenses among a wide variety of applicants.”³⁷ Far from being tailored to the needs of one or two “favored” companies, the proposed rules create opportunities for a wide variety of carriers who currently do not have large low-band spectrum holdings.³⁸ Competitive Carriers Association (CCA) has invested significant resources in advocating for our members in this proceeding because it represents what may be the last remaining opportunity for them to gain low-band spectrum for the foreseeable future.³⁹ Smaller carriers bid aggressively in Auction 73, the 700 MHz auction, with winning bids totaling nearly \$2 Billion.⁴⁰ By creating opportunities for these smaller carriers, the proposed rules will promote the public interest in expanded choice, increased innovation, and lower prices.⁴¹ And those goals can be achieved without shutting any provider out of the auction entirely. As noted above, even where limits are triggered, AT&T and Verizon will be able to bid on unreserved spectrum in every market.

broadband PCS, and Specialized Mobile Radio (SMR) spectrum to promote diversity and competition in mobile services, ‘recognizing the possibility that mobile service licensees might exert undue market power or inhibit market entry by other service providers if permitted to aggregate large amounts of spectrum.’ The Commission found that a spectrum cap provided a ‘minimally intrusive means’ to ensure that the mobile communications marketplace remained competitive and preserved incentives for efficiency and innovation.”); *see also* Peter Cramton, Evan Kwerel, Gregory Rosston, & Andrzej Skrzypacz, *Using Spectrum Auctions to Enhance Competition in Wireless Services*, at 4 (Feb. 2011), *available at* <http://www-siepr.stanford.edu/repec/sip/10-015.pdf>.

³⁷ *See* 47 U.S.C. § 309(j); *AT&T Letter* at 5. AT&T also argues that crafting rules to prevent one company from “running the table” are arbitrary. In this contention, AT&T both overlooks the statutory command for the Commission to craft auction rules that give access to spectrum to a wide variety of applicants and misunderstands the proposal. While it is likely that market realities prevent a reserve-eligible bidder from winning all of the unreserved and reserved licenses in an area, the proposed rules alone do not necessarily prevent that outcome.

³⁸ *AT&T Letter* at 5.

³⁹ *See, e.g.,* Steven K. Berry, *Rural America will Benefit from Competitive Carriers’ Access to Additional Low-Band Spectrum*, CCA Blog, *available at* <https://competitivecarriers.org/rca-blog/rural-america-will-benefit-from-competitive-carriers-access-to-additional-low-band-spectrum/9113844> (“CCA Blog”).

⁴⁰ *See* CCA Blog; Mobile Future, *FCC Spectrum Auctions and Secondary Market Policies: An Assessment of the Distribution of Spectrum Resources Under the Spectrum Screen* (Nov. 2013), attached to Mobile Future Ex Parte Letter, GN Docket No. 12-268, WT Docket No. 12-269 (Nov. 13, 2013), *available at* <http://apps.fcc.gov/ecfs/document/view?id=7520957584>.

⁴¹ Creating opportunities for competitive carriers to acquire low-band spectrum will attract investment by carriers who might otherwise decide not to participate. Businesses, including Sprint and T-Mobile’s large investors, can be presumed to act rationally. Any rational business, including investors such as Softbank and Deutsche Telecom, will be deterred from bidding in the 600 MHz incentive auction if the two distant competitors in which they have invested have no realistic prospect of overcoming the substantial risk that the two nationally dominant carriers will foreclose access to critical low-band spectrum resources.

AT&T's real complaint seems to be that it will not be allowed to buy all of the 600 MHz spectrum being offered. Few parties other than AT&T seriously contend that the Commission should permit one or two carriers to buy all of the available low-band spectrum resources in the 600 MHz auction. If anything, the record reflects that the proposed amount of unreserved spectrum is too high. If the FCC adopts a forty-megahertz unreserved segment, for example, AT&T and Verizon can simply split the unreserved spectrum evenly among them at twenty megahertz each. Whatever the precise amounts of reserved and unreserved spectrum associated with any given band plan, the FCC's auction design should ensure that the two dominant carriers compete against each other rather than divide the available resources between them. Even if AT&T were to win a single ten-megahertz block, that block of beachfront 600 MHz spectrum would hardly prove "useless," as AT&T claims. For example, AT&T could bond a ten-megahertz block of 600 MHz with its substantial AWS spectrum holdings to increase network capacity.⁴² Indeed, AT&T has already employed carrier aggregation by bonding 700 MHz spectrum with AWS spectrum to enhance capacity on the company's LTE networks, and could readily do the same with a ten-megahertz block of 600 MHz spectrum acquired in the incentive auction."⁴³

C. Limits on post-auction sales help maximize the auction's competitive benefits.

Although AT&T objects to post-auction restrictions on resale of spectrum, Congress has specifically directed the Commission to adopt "anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits."⁴⁴ Auction rules limiting the transfer or assignment of reserved licenses prevent carriers "from profiting by the rapid sale of licenses acquired through the benefit of preference policies."⁴⁵ Rules preventing unjust enrichment ensure that efforts to promote competitive access to spectrum and expanded choice for consumers can succeed. These rules also ensure that the revenue generated from wireless spectrum flows to the Treasury and public interest goals like FirstNet – not to speculators or "sham" organizations that immediately flip their licenses to the largest incumbents.⁴⁶ These rules are sound policy supported by the record.

⁴² AT&T Senior Vice President for architecture and planning Kristin Rinne explained supplemental downlink technology in a sworn declaration submitted to the Commission in 2011. Rinne stated that "[s]upplemental downlink technology . . . facilitates the bonding of non-contiguous spectrum onto a single wider channel, which permits carriers to address the asymmetry of data flows between downlink and uplink channels." Declaration of Kristin S. Rinne, Senior Vice President-Architecture & Planning, AT&T Services, Inc. at ¶ 6, *attached to* Application of Qualcomm Inc. and AT&T Mobility Spectrum LLC for Assignment of Authorization, File No. 0004566825 (filed Jan. 13, 2011, amended Feb. 9, 2011) ("*Rinne Declaration*").

⁴³ See Phil Goldstein, *AT&T Lights Up LTE Advanced Carrier Aggregation in Chicago, Other Markets*, FIERCE WIRELESS, Mar. 7, 2014, <http://www.fiercewireless.com/story/att-lights-lte-advanced-carrier-aggregation-chicago-other-markets/2014-03-07> (last accessed Apr. 20, 2014).

⁴⁴ 47 U.S.C. § 309(j)(4)(E).

⁴⁵ *In re Winstar Lmds, LLC.*, 17 FCC Rcd 7084, 7087-88 (2002).

⁴⁶ See Gregory F. Rose & Mark Lloyd, *The Failure of FCC Spectrum Auctions*, Center for American Progress (May 2006),

D. A holistic limit set at one-third of low-band mobile spectrum is well grounded in precedent and likely to prove effective.

AT&T provides no reason to think that the one-third spectrum-aggregation limit is arbitrary and capricious. To the contrary, this limit strikes the proper balance between competition and scale. The one-third limit reflects longstanding Commission precedent and a longstanding desire to assure the presence of at least three competitors in every market, which has a direct line of precedent back to the first spectrum auctions in the United States.⁴⁷

At some level, of course, any numerical line drawn by an agency is arbitrary, in the sense that the agency could just as easily have picked 32 percent or 34 percent. But that is why the D.C. Circuit requires only that the agency provide “a rational connection between the facts found and the choice made.”⁴⁸ The proposed rules’ obvious connection to the FCC’s longstanding effort to have at least three competitors in each market easily satisfies that test here.⁴⁹ And the FCC remains justifiably concerned that dominance of spectrum resources – especially low-band resources that are the least readily available, the most useful for in-building coverage, and most highly concentrated in the hands of the two dominant players – may be used to affect a foreclosure strategy. The generally applicable one-third limit thus rationally accounts for present holdings and is logically related to the FCC’s longstanding and legitimate public policy goal of having at least three competitors in every market.

E. Total costs of deploying mobile broadband service – including license costs – increase as frequencies increase.

Contrary to AT&T’s repeated misrepresentation, record evidence proves that AT&T’s theory that operating and capital cost differences will be offset by lower spectrum prices has not materialized in the real world for a variety of reasons.⁵⁰ In fact, “the total costs for deploying – costs to purchase spectrum plus capital and operating costs – are much greater for high-band spectrum as compared to low-band spectrum.”⁵¹ Sprint’s detailed longitudinal analysis of the costs associated

http://www.americanprogress.org/kf/SPECTRUM_AUCTIONS_MAY06.PDF cited in T-Mobile Ex Parte Notice, GN Docket No. 12-268, WT Docket No. 12-269 (Jan. 23, 2014).

⁴⁷ See, e.g., Jon Van, *FCC to Usher in New Era for Wireless Phones*, Chicago Tribune (Sept. 23, 1993); Michael K. Powell, Chairman, FCC, Remarks at the Wireless Communications Association International (June 3, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-248003A1.pdf (“Magical things happen in competitive markets when there are at least three viable . . . competitors.”).

⁴⁸ *Verizon*, 740 F.3d at 643-44 (quoting *State Farm*, 463 U.S. at 43).

⁴⁹ See Comments of the Computer & Communication Industry Association (CCIA), WT Docket No. 12-269, at 7 (Nov. 28, 2012), citing *Policies Regarding Mobile Spectrum Holdings*, Notice of Proposed Rulemaking, WT Docket No. 12-269, ¶ 34 (rel. Sept. 28, 2012).

⁵⁰ See *AT&T Letter* at 7.

⁵¹ See, e.g., *The Imperative for a Weighted Spectrum Screen: Low-, Mid-, and High-Band Frequencies Are Not Freely Substitutable Market Inputs*, attached to Letter from Lawrence Krevor, Vice President, Sprint Corp., to Marlene H. Dortch, Secretary, Federal Communication Commission, WT Docket No. 12-269, iii (Apr. 4, 2014) (“*Sprint April 4th White Paper*”).

with acquiring, deploying, and operating wireless broadband networks at different frequencies clearly demonstrates “that the *total* cost, including spectrum costs, for deploying a network using existing high-band spectrum is up to 13 or more times the costs of deploying a network using existing low-band spectrum” in rural areas.⁵² In suburban areas, Sprint found that deploying is about *twice* as expensive if a carrier uses high-band instead of low-band spectrum. The financial advantages that stem from using low-band spectrum have helped cement AT&T and Verizon’s duopoly. In 2001, AT&T and Verizon controlled 43% of all U.S. wireless subscriptions. Today these companies control 66% of all wireless subscriptions and 70% of the lucrative post-paid market.⁵³

F. The proposed rules benefit rural, urban, and suburban areas.

By portraying the FCC’s rules as intended largely to benefit rural areas, AT&T ignores one of the key benefits of low-band spectrum, namely the ability to serve wireless broadband subscribers more readily from the indoor locations where something approaching 80% of all wireless broadband data traffic occurs today.⁵⁴ The FCC’s spectrum-aggregation limits are not exclusively or even principally intended to promote diverse holdings of low-band spectrum in rural areas. While low-band spectrum is extremely important to achieve coverage of rural areas at affordable costs, low-band spectrum is also useful at penetrating inside buildings – a fact exhaustively documented throughout the voluminous record of this proceeding.⁵⁵ Because the rule is not intended to benefit rural areas only, a rule that permits additional acquisitions by the two nationally dominant providers in rural areas even as it would deny acquisitions in urban areas where the two nationally dominant providers hold exceptionally high proportions of low band spectrum demonstrates how the rule logically and rationally distinguishes between salient market characteristics to effect greater license diversity based on relevant market conditions in different areas of the country.

Oddly, AT&T portrays the low-band spectrum aggregation as illogical because AT&T is, in fact, eligible to bid on low-band spectrum in many rural areas of the country.⁵⁶ But the FCC’s rules do not limit AT&T’s spectrum aggregation in many rural areas because, in many cases, AT&T is not the dominant spectrum holder there. In cases where AT&T holds little spectrum, such as many rural areas, AT&T is a beneficiary of the rule and can acquire both reserved and non-reserved blocks of spectrum in the 600 MHz auction. In cases where AT&T holds an exceptionally large share of the spectrum, however, other carriers benefit. Far from representing an illogical application of the rule, the FCC’s rules rationally and logically *permit* AT&T to acquire additional resources in both the reserved and unreserved blocks in areas where AT&T does not hold excessive spectrum and

⁵² *Id.* at 10.

⁵³ See Comments of Free Press, WT Docket No. 12-269 (Nov. 28, 2012), at 5 (citing Petition to Deny of Free Press, *In the Matter of Applications of AT&T, Inc. and Deutsche Telekom AG For Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65 (May 31, 2011), at Figure 2 and SNL Kagan Wireless Industry Benchmarks.

⁵⁴ *AT&T Letter* at 9.

⁵⁵ See Declaration of Mark McDiarmid, Vice President for Radio Network Engineering and Development, T-Mobile USA, Inc., GN Docket No. 12-268, WT Docket No. 12-269, ¶ 7 (Apr. 11, 2014) (“*McDiarmid Declaration*”).

⁵⁶ *AT&T Letter* at 9.

constrain AT&T's ability to acquire additional spectrum where AT&T does hold excessive spectrum resources.

G. Basic physics and detailed engineering evidence underpin the proposed rules.

AT&T argues that the record does not reflect engineering support for “key justification underlying the bidding exclusions.”⁵⁷ There is ample evidence in the record noting the superior propagation characteristics of low-band spectrum and repeated statements by AT&T and Verizon noting the superior propagation characteristics of this spectrum. For example, T-Mobile and Sprint have demonstrated, both theoretically and empirically, that “electromagnetic signals generally exhibit path loss as frequency increases.”⁵⁸ T-Mobile and Sprint have also explained in considerable detail how “radiofrequency operations in spectrum bands below 1 GHz exhibit much lower path losses and less susceptibility to signal disruption than operations on wireless broadband in spectrum bands above 1 GHz.”⁵⁹ Based on these showings, T-Mobile and Sprint have demonstrated using detailed economic models and supported by sworn declarations that mobile operators require a mix of spectrum to provide cost-effective, competitive service.⁶⁰ As has been repeatedly explained and elaborately documented by T-Mobile and other commenters, this substantial record evidence speaks directly to the risk that the two nationally dominant carriers will foreclose competitors from acquiring access to critical low-band input resources.⁶¹ CCA has prepared a separate, detailed response to AT&T's claims about the engineering evidence, also filed today.

⁵⁷ *AT&T Letter* at 8.

⁵⁸ See *McDiarmid Declaration* ¶ 7; see Lawrence R. Krevor *et al.*, *Differences Between Frequencies Do Not End at 1 GHz: The Screen Must Account for Differences Between Mid- and High-Band Spectrum*, attached to Letter from Lawrence R. Krevor, Vice President, Sprint Corp., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-269, at 6 (May 5, 2014) (“*Sprint May 5th White Paper*”).

⁵⁹ *McDiarmid Declaration* ¶ 7; see *Sprint May 5th White Paper* at 6-9.

⁶⁰ *Sprint April 4th White Paper* at ii; *McDiarmid Declaration* ¶ 9.

⁶¹ *Ex Parte* Submission of the United States Department of Justice, WT Docket No. 12-269, at 14 n.21 (Apr. 11, 2013); Letter from Rebecca Murphy Thompson, General Counsel, Competitive Carriers Association, to Marlene Dortch, Secretary, FCC, GN Docket No. 12-268, WT Docket Nos. 12-69, 12-269, 10-208, WC Docket No. 10-90 at 5 (June 28, 2013). See also Peter Cramton, *The Rationale for Spectrum Limits and Their Impact on Auction Outcomes*, attached to Letter from Trey Hanbury, Counsel to T-Mobile, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268, WT Docket No. 12-269, at 8 (Sept. 9, 2013) (observing that in recent European auctions regulators have employed limits with respect to low-band spectrum because of that spectrum's scarcity and ideal propagation characteristics) (“The Rational for Spectrum Limits”); Martin Cave & William Webb, *Spectrum Limits and Auction Revenue: the European Experience*, attached to Letter from Rafi Martina, Counsel to Sprint, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268 and WT Docket No. 12-269, at 1, 5 (July 29, 2013) (noting that most European regulators have adopted spectrum aggregation limits for auctions of below-1 GHz spectrum because these bands “enabl[e] a degree of coverage that would be difficult to replicate without it”).

H. The proposed rules promote increased revenue and a successful auction.

AT&T argues that the proposed rules raise the “risk of auction failure.”⁶² The FCC’s proposed rules will both support broadcaster participation and ensure the success of the incentive auction. Well-designed spectrum aggregation limits have been shown to increase revenues by forcing incumbents to bid against each other for the unreserved licenses, rather than simply dividing the available pool between them, and by encouraging smaller players to actively participate and increase the budgets they bring to auction.⁶³ It is axiomatic that when demand exceeds supply, prices increase, and lower demand yields lower prices. Imposing restraints on bidding that create more demand than supply is a reasonable tool for generating sufficient auction revenues and, critically, generating large payments to broadcast licensees.

Encouraging rivalry between dominant providers has repeatedly proved effective for increasing auction revenues. This was the approach taken in the recent, very successful Canadian 700 MHz auction. In that auction, Canadian regulators implemented rules that reserved some licenses for bidders other than the dominant three carriers. The rules forced the incumbents to bid against each other for the blocks of unreserved licenses.⁶⁴ The ensuing bidding war generated US\$4.8 billion in revenue – the most ever raised by a wireless auction in Canada, and significantly more than was anticipated prior to the auction.⁶⁵ Similar dynamics influenced the outcome of Canada’s 2008 AWS auction, in which regulators reserved a 40 MHz spectrum block exclusively for new entrants. The reserved block motivated strong participation from bidders outside the Canadian Big 3 and caused them to bring substantial money to the auction. Indeed, the reasonable restraints on the dominant carriers caused the smaller carriers to also pay notably high prices for this spectrum, although somewhat lower, relatively speaking, than the prices paid by the Big 3 incumbents. The result was a highly competitive auction that generated \$4.25 billion in revenue – nearly three times its initial revenue expectations.

Spectrum-aggregation limits also create an opportunity for the other bidders to acquire spectrum from which they might otherwise be foreclosed. This expanded opportunity motivates bidders to increase participation; carriers who anticipate being shut out by the incumbents will choose not to participate in the auction and avoid significant participation costs. Experts have

⁶² *AT&T Letter* at 10.

⁶³ See, e.g., Peter Cramton, *Auction Revenues and Competition Policy in the 600 MHz Auction*, GN Docket 12-268 (May 8, 2014); Peter Cramton, *The Revenue Impact of Competition Policy in the FCC Incentive Auction* (Dec. 2013), attached to Ex Parte Presentation of T-Mobile, GN Docket No. 12-268, WT Docket No. 12-269 (Dec. 6, 2013).

⁶⁴ See Peter Cramton, *Lessons from the Canadian 700 MHz Auction* (Apr. 2014), attached to Letter from Trey Hanbury, Counsel to T-Mobile USA, Inc., to Marlene Dortch, Secretary, FCC, GN Docket No. 12-268, WT Docket No. 12-269 (Apr. 3, 2014).

⁶⁵ See Steven Chase, Rita Trichur, and Sophie Cousineau, *Frenzied Auction Raises Stakes in Canada’s Wireless War*, *The Globe and Mail* (Feb. 19, 2014), available at <http://www.theglobeandmail.com/report-on-business/ottawa-to-net-nearly-53-billion-from-spectrum-auction/article16980570/> (last accessed May 11, 2014).

shown that auction revenues are very sensitive to the level of competition.⁶⁶ Encouraging participation by even one additional bidder can have a pronounced impact in increasing revenues. Furthermore, under the FCC's proposed auction rules, aggregation limits only come into play *after* the 600 MHz incentive auction generates a pre-set amount of revenue.⁶⁷

I. The 700 MHz D and E blocks should be included in the calculations assessing eligibility to bid for reserved spectrum blocks.

AT&T argues that including low-band, unpaired 700 MHz D and E blocks in the low-band spectrum screen is arbitrary and capricious because the spectrum will be bonded with mid- or high-band spectrum and, therefore, should be treated more like mid- or high-band spectrum rather than low-band spectrum for purposes of the low-band spectrum aggregation limit.⁶⁸ AT&T itself, however, has expressed its intent to bond the low-band 700 MHz D and E Block spectrum with other low-band spectrum that AT&T holds, namely the 850 MHz cellular bands.⁶⁹ The FCC can hardly be faulted for taking AT&T's recent declaration as an accurate statement of AT&T's intentions.

J. The proposed rules are the result of an open and transparent proceeding that has featured high levels of public engagement.

The FCC's incentive auction proceeding its aggregation proceeding has been pending for more than one year and seven months. AT&T now suggests that the Commission has provided it insufficient notice that the Commission might consider auction rules that limit spectrum aggregation in order to promote competition.⁷⁰ But AT&T's own actions demonstrates otherwise: AT&T has made more than 41 filings in the incentive auction docket and hired a small army of lobbyists to refute any rules that would limit its participation in the auction. Furthermore, the Commission has made an unprecedented commitment to transparency in this proceeding, arranging meetings with a wide variety of parties to explain the staff proposal in development and offer them an opportunity

⁶⁶ See, e.g., Peter Cramton, *Auction Revenues and Competition Policy in the 600 MHz Auction*, GN Docket 12-268 (May 8, 2014).

⁶⁷ Chairman Tom Wheeler, *Ensuring a Fair and Competitive Incentive Auction*, FCC BLOG (Apr. 25, 2014), <http://www.fcc.gov/blog/ensuring-fair-and-competitive-incentive-auction>.

⁶⁸ *AT&T Letter* at 10.

⁶⁹ See *Rinne Declaration* ¶ 5 (“The transaction also will enable AT&T to combine the [unpaired 700 MHz] Qualcomm Spectrum with other spectrum AT&T may use in its LTE network, including 1900 MHz and 850 MHz spectrum.”). Even when low-band spectrum is used as supplemental downlink to augment performance of a primary mid- or high-band spectrum, the user will still see increased performance compared to using mid- or high-band to augment a primary mid- or high-band service. AT&T's contention to the contrary has no basis in fact. While the propagation advantage of the low-band in terms of range or distance will be constrained to that of the primary mid- or high-band, the performance of the low-band spectrum will be vastly superior to the mid- or high-band performance up until the point at which coverage is lost due to range limitations of the higher-frequency spectrum.

⁷⁰ *AT&T Letter* at 11.

to respond.⁷¹ In recent weeks, AT&T has provided a detailed critique of the staff proposal in dozens of pages of filings,⁷² coupled with an aggressive press and congressional lobbying strategy.⁷³

These rules could hardly be seen as a surprise given their strong connection to the mandates of the Spectrum Act and the Communications Act. The Notice of Proposed Rulemaking (NPRM) makes the types of policies under consideration by the Commission even more clear.⁷⁴ In the NPRM, the FCC specifically noted that Section 6404 of the Spectrum Act affirmed its authority to adopt and enforce spectrum aggregation limits.⁷⁵ Significantly, as an example of a potential rule it ultimately might promulgate, the Commission sought public comment on a proposal that would “permit[] any single participant in the auction to acquire no more than one-third of all 600 MHz spectrum being auctioned in a given licensed area.”⁷⁶

Despite this very clear signal from the Commission, AT&T now claims it has not received adequate notice and opportunity to comment on this subject. Under the APA, an agency seeking to promulgate a new rule must naturally provide adequate notice of it and an opportunity for the public

⁷¹ See Amy Schatz, “Bidding Rules Becoming Clearer for Upcoming Airwaves Auction,” re/code, April 14, 2014, *available at* <http://recode.net/2014/04/14/bidding-rules-becoming-clearer-for-upcoming-airwaves-auction/> (“Details of Wheeler’s plan began leaking out Friday evening after FCC staff and company lobbyists were briefed on some details”).

⁷² See, e.g., Letter from Wayne Watts, Senior Executive Vice President and General Counsel, AT&T, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-268 (May 2, 2014) (“The Commission is currently considering auction rules that would shield almost half of the available 600 MHz spectrum in each market from a fully open auction, in order to allow providers like T-Mobile and Sprint to acquire such spectrum without having to compete at auction with AT&T and Verizon”); AT&T Ex Parte Notice, GN Dockets No. 12-268, 12-354, WT Docket No. 12-269 (Apr. 24, 2014) (“We discussed concerns raised in AT&T’s ex parte filing last week and how the FCC could structure auction rules in a manner designed to promote maximum participation”); AT&T Ex Parte Notice, GN Docket No. 12-268, WT Docket No. 12-269 (Apr. 16, 2014) (“[W]e discussed the restrictions being proposed for the 600 MHz auction”).

⁷³ See Gautham Nagesh, “FCC Head’s Spectrum Plan Gets Spotty Reception,” Wall Street Journal, May 11, 2014, *available at* <http://online.wsj.com/news/articles/SB10001424052702304431104579552021797190120> (“[Verizon and AT&T] have countered by heavily criticizing the proposal, with AT&T even threatening to sit out the auction”); Bryce Baschuk, “House Republicans Blast FCC Proposal to Set Limits on Airwaves Bidders,” Telecommunications Law Resource Center, May 7, 2014, *available at* <http://www.bna.com/house-republicans-blast-n17179890258/> (“Executives at Verizon and AT&T recently argued that the commission’s spectrum aggregation rules would offer an unfair advantage”).

⁷⁴ *Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions*, 27 FCC Rcd 12357 (2012) (“NPRM”).

⁷⁵ NPRM ¶ 383.

⁷⁶ NPRM ¶ 384.

to comment on its content.⁷⁷ But agencies routinely meet this requirement through the process of issuing an NPRM, as the Commission did here, and providing adequate opportunity for public feedback. When an agency proceeds in this fashion and then issues a final rule, that final rule does not have to be identical to that included in the NPRM. Instead, it “need only be a logical outgrowth of its notice.”⁷⁸

The D.C. Circuit has held repeatedly that, to succeed on a lack of notice claim like the one AT&T urges here, a petitioner must identify a significant gap between what was shared in the NPRM and the final rule, such that “interested parties would have had to divine the agency’s unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.”⁷⁹ Put another way, “[a]n agency’s final rule qualifies as the logical outgrowth of its NPRM ‘if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.’”⁸⁰ There is no requirement that the proposed and final rules be coterminous.⁸¹

The record evidence in this matter makes it abundantly clear that the Commission made it known to AT&T and other interested parties that it was considering promulgation of rules like the ones at issue here. The Commission also sought and considered public comment on the proposal. AT&T not only had that opportunity, but took advantage of it repeatedly. The lack of notice claim at this stage is meritless.

K. The proposed rules effectively balance maximizing participation and promoting competition.

AT&T also asserts that the Commission’s approach is impermissible because it does not constitute the least restrictive means by which it could reach its stated goal.⁸² There is no statutory basis for this argument, nor is it supported in the case law. To the contrary, it is clear that, when reviewing an agency decision, a court may not impose a so-called “least restrictive means” standard because doing so would effectively displace the agency’s judgment in favor of its own.⁸³ Indeed, the

⁷⁷ 5 U.S.C. § 553(b)(3) (requiring notice of proposed rulemaking that includes “either the terms or substance of the proposed rule or a description of the subjects and issues involved”); *Agape Church*, 738 F.3d at 411.

⁷⁸ *Id.* (internal quotation omitted).

⁷⁹ *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1080 (D.C. Cir. 2009); *see, e.g., Allina Health Servs. v. Sebelius*, -- F.3d ---, 2014 WL 1284834, at * 3-4 (D.C. Cir. Apr. 1, 2014) (holding that an NPRM that announced the agency’s intention to clarify its interpretation of an existing rule did not provide adequate notice that it also might promulgate a new and significantly different rule); *Environmental Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (reaching a similar conclusion and explaining that agencies may not “pull a surprise switcheroo on regulated entities”).

⁸⁰ *Agape Church*, 738 F.3d at 411 (quoting *CSX Transp.*, 584 F.3d at 1079-80)).

⁸¹ *Id.* at 412.

⁸² *AT&T Letter* at 12.

⁸³ *White House Vigil for the ERA Committee v. Clark*, 746 F.2d 1518, 1531 (D.C. Cir. 1984) (“The expertise of courts lies in determining whether an agency’s decision is within the zone of

D.C. Circuit has held in an analogous context that judicial review of Commission rulemaking cannot be subject to such heightened scrutiny. In *American Radio Relay League, Inc. v. FCC*, 617 F.2d 875 (D.C. Cir. 1980), the court announced that it could not “impute to Congress an intent that the Commission move only by an alternative that is the ‘least restrictive’”⁸⁴ AT&T has not even intimated why it believes this restriction should not apply here. Despite its vague protestations, there is absolutely no requirement that the Commission’s rulemaking be the “least restrictive means” by which it can reach its regulatory aims.

AT&T suggests the Commission erred because it did not select a “less restrictive alternative,” such as divestiture, to meet its policy goals.⁸⁵ Even if the Commission were required to select the least restrictive alternative – and it is not – after-the-fact divestitures would be insufficient to meet the Commission’s policy goals for several reasons. First, relying on divestitures causes substantial uncertainty and delay, and it leave operators unable to maintain capital financing during the pendency of proceedings to investigate divestiture. Second, *ex post* divestitures would fail to promote participation by other potential bidders, whose entry in the auction would be discouraged if they believe they cannot win. Third, ad hoc localized divestitures provide insufficient scale to motivate investment and deployment by the national carriers most likely to challenge AT&T. Finally, the divestiture process would permit dominant players to select purchasing companies; the seller could use such sales to reduce competition by splitting the sale among multiple operators and/or selling the resource to the less viable operator in any given market.

III. Conclusion

The Spectrum Act and the Communications Act give the Commission clear authority to adopt spectrum aggregation limits that promote competition and increase auction revenue – policies that in turn are supported by a detailed record. AT&T’s arguments to the contrary are unpersuasive.

This *ex parte* notification is being filed electronically with your office pursuant to Section 1.1206 of the Commission’s Rules.

Sincerely,

/s/ Steven K. Berry

constitutionality, not in choosing between options within that zone. A court may not require that the agency adopt the ‘least restrictive alternative,’ thereby substituting its judgment for that of the regulators.”); *see also Juluke v. Hodel*, 811 F.2d 1553, 1560 (1987) (reiterating same); *Nat’l Mining Ass’n v. Kempthorne*, 512 F.3d 702 (D.C. Cir. 2008) (upholding interpretive rule that agency readily conceded was not the “least restrictive alternative”).

⁸⁴ *American Radio Relay League, Inc. v. FCC*, 617 F.2d 875, 881 (D.C. Cir. 1980).

⁸⁵ *AT&T Letter* at 12. *See, e.g.*, Comments of AT&T, WT Docket 12-269, at 11 (Nov. 28, 2012) (claiming that “divestiture solves the spectrum aggregation concern”).

Steven K. Berry
President & CEO

/s/ Rebecca Murphy Thompson

Rebecca Murphy Thompson
General Counsel